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Congress Considers Amendments To Freedom of Information Act

The Freedom of Information Act, which was first passed in 1966, and then passed again in amended and strengthened form in 1974, has come to be accepted as an everyday part of American life and as a pillar of democratic government. The disclosure requirements of FOIA as amended are sweeping and rigorous. They embrace all government agencies, including intelligence and law enforcement agencies; and, while making provision for the withholding of records on national security grounds, they do not provide a blanket exemption for confidential intelligence or law enforcement files but require, instead, that each document and each paragraph in each document be carefully checked for the purpose of segregating releasable from non-releasable information and assuring the maximum possible disclosure.

Like all new legislation, however, FOIA was to a certain degree experimental. The sponsors of FOIA wanted to reinforce the citizens' right to know, they wanted more open government, and they wanted to put an end to the abuses perpetrated in the name of government secrecy and executive privilege. This the Freedom of Information Act has accomplished. But it also had certain effects that were unintended by our legislators.

When President Ford vetoed the amended FOIA in October 1974, he justified his action on the grounds that it would adversely affect the intelligence community and the law enforcement community and was otherwise "unconstitutional and unworkable." His veto was overridden by a vote of 371 to 31 in the House, and 65 to 27 in the Senate. An increasing number of Senators and Congressmen have come to the conclusion that the experience with the Act has borne out some of President Ford's misgivings, especially in terms of its impact on the intelligence and law enforcement communities. Reflecting the growing misgivings in Congress, five bills containing separate amendments have been introduced in the Senate, and 27 in the House.

During the month of July, House and Senate committees took testimony on the pending amendments to FOIA. There appears to be a widespread bipartisan and public perception that national security requirements make it mandatory to modify the Freedom of Information Act in several important respects. The administration has indicated that it plans to submit a package of its own amendments towards the end of September. It is unlikely any action will be taken on pending bills until this package is received and evaluated.

For the information of the readers of *Intelligence Report*, we have decided to devote this entire issue to the Freedom of Information Act and the testimony of some of the principal witnesses who appeared before the Senate Judiciary Subcommittee on the Constitution and the Senate Intelligence Committee.

In the pages that follow we reproduce extensive excerpts from the testimony of Robert L. Saloschin, former chairman of the Freedom of Information Committee, Department of Justice, and a consultant to the Standing Committee on Law and National Security; from the testimony presented on behalf of the Department of Justice, the Department of Defense and the CIA; and from the testimony of Steven R. Dornfeld on behalf of the Society of Professional Journalists, Sigma Delta Chi. While there were many other witnesses before the House and Senate committees, we believe that the extracts we here present will enable our readers to better understand the positions of the principal government agencies concerned with national security, as well as the arguments advanced by those who are opposed to any significant changes in FOIA.

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Excerpts from the statement of ***Robert L. Saloschin,*** *former chairman, Freedom of Information Committee, and former director, Office of Information Law and Policy, Department of Justice, and consultant to the Standing Committee on Law and National Security, before the Senate Judiciary Subcommittee on the Constitution, July 15.*

The Freedom of Information Act is important from several perspectives: History, comparative government, its sheer magnitude, its central objectives, and the major public and private values with which it must be reconciled.

In legal terms FOIA may be only an open records law, but it has been a bellwether for other openness changes in federal, state and private organizations. FOIA really represents a major innovation in modern democratic government, partly comparable to free schools, expanded suffrage, the initiative and referendum, the broadcast media, or even the separation of powers. Moreover, FOIA is with us at a time of explosive growth in information-handling technology—computers and communications—and in the amount of information itself. In a period which some call the "Information Age," the success or even the survival of individuals and institutions may increasingly depend on obtaining (or preventing others from obtaining) access to information, much of it held by the government.

FOIA is being watched not only by states and private organizations but also by other great democracies, including Canada, Australia, Japan, and several European nations. Part of this interest has to do with FOIA's effects on trans-national movements of information in areas such as finance, trade, technology, law enforcement, and national security, and part of it is with a view to developing their own FOIA's in the light of our experience....

FOIA's original and central objectives are in harmony with the success and survival of our free society: To make popular government work better, through a better informed electorate, and through better public accountability of government agencies....

The Act seeks to strike a balance, which from time to time may need adjustment by Congress, between the public's right to know and the safeguarding of these

Principal Provisions of Senate Amendments to FOIA

S.587. Introduced February 26 by Senator Hatch. Extends ten day time limit for freedom of information requests. Exempts from disclosure rosters of law enforcement personnel and personnel of national intelligence agencies, confidential law enforcement training manuals, investigative handbooks and manuals dealing with confidential investigative technology. Also exempts from disclosure all information received from foreign governments and from state and local government agencies on a confidential basis. Makes the release of information to foreign nationals discretionary instead of mandatory, as it is today. Provides for *in camera* procedures to process challenges against decisions by law enforcement or intelligence agencies to withhold records on security grounds. Bans release of criminal investigative records for a period of ten years after termination of an investigation—with or without prosecution.

S.1235. Introduced May 20 by Senator D'Amato (for himself and Senators Goldwater and Nickles). Exempts CIA from disclosure requirements of FOIA in the cases of all materials involving personnel selection, training, internal operations, office management, organization, clandestine collection and covert operations. It also removes the disclosure of CIA records from the jurisdiction of the courts, with the exception of personnel records necessary for an individual to obtain employment outside the Agency. Provides that if part of a document comes under exemption, the entire document is exempt.

S.1247. Introduced May 21 by Senator Dole (for himself and Senators Hatch, Laxalt, Cochran, Lugar, Schmidt and DeConcini). Seeks to protect private business by broadening exemptions to cover "proprietary information" which "would not customarily be disclosed to the public by the person from whom it was obtained." Gives the person who submits private information to the government notice when disclosure of that information is requested and an opportunity to voice objections to the release of the information.

S.1273. Introduced May 21 by Senator Chafee (for himself and Senator Goldwater). Exempts CIA from certain provisions of FOIA but leaves open a requirement to process requests by U. S. citizens and by lawful aliens for certain personal information. (The bill is actually an amendment to the Central Intelligence Agency Act of 1949.)

S.1394. Introduced June 18 by Senator DeConcini. Exempts the Secret Service from disclosing information related to its protective function.

[It would take too much space to summarize the 27 amendments to FOIA introduced in the House of Representatives. By and large, they parallel the proposed amendments on the Senate side, obviously with some modifications.]

major values, which I have called "protectable interests." While in legal terms FOIA has nine exemptions that permit withholding, these nine exemptions represent five great "protectable interests"—the public's interests in national security, in law enforcement, and in government efficiency, and the private sector's interests in business confidentiality, and in individual privacy. Whenever there seem to be real conflicts between the public's right to know and any of these five major interests, there will be problems for the agencies, for the courts, for Congress and for a responsible citizenry. . . .

I must caution that a truly valid cost-benefit analysis of FOIA will not be easy. Not only do we lack sufficient data, but some of the more significant costs and benefits are extremely difficult to measure with any accuracy in quantitative terms.

For example, on the benefit side, how do you measure the value to citizens and taxpayers of a law which anyone can use to expose governmental waste, fraud, abuse, favoritism, and corruption? How do you measure the value of a law under which useful information for health, safety and productivity, which the government has acquired at public expense, is available to the public? How do you measure the value of a law which gives responsible and patriotic citizens enforceable assurances that discussions and debates on public policies can be not only free but also well informed?

But on the other side, how do you measure the costs to the nation of a law with chilling effects on sources who have important information for foreign intelligence or law enforcement or other federal functions, but hesitate to provide it because they fear possible disclosure under FOIA may seriously hurt them? How do such costs relate, for example, to the national cost of interstate theft, or to the cost of a serious international setback in economic or strategic matters? And how can you measure the costs in dollars, morale, and effects on the public of diverting agency staffs away from the work which Congress expects them to perform by making them process large and burdensome FOIA requests made for purely private purposes in order to obstruct, harass and delay legitimate agency activity which the requester or his principal opposes?

Some Possible Amendments

FOIA needs substantial amendments in several areas. . . . But FOIA should not be repealed or seriously crippled as an effective instrument for its original objectives. This means preserving FOIA's key fundamentals, including the following: That it applies to all records that belong to an agency and makes them available except as exempt; that requesters do not have to give reasons for asserting their rights of access; that an agency has reasonable discretion to disclose withholdable material, unless disclosure is prohibited by some other law; and that there is effective judicial review of agency withholding with the burden on the agency to justify it. . . .

[Mr. Saloschin spoke briefly about "the protectable interest in national security information." In the interest of brevity we have omitted this section because the discussion is repeated in the testimony of other witnesses.]

Law Enforcement Investigations

The efficiency of law enforcement largely depends on cooperation in investigations by sources who have useful information. However, because of fears of embarrassment, reprisals, or even loss of time, such information will often be provided to investigators only if the source is guaranteed that his identity will remain secret.

In the summer of 1979, FBI Director Webster furnished legislators with a collection of about 125 actual illustrations, with names deleted, of recent refusals to provide information for FBI investigations by various persons, including a federal judge, for fear of disclosure of the source's identity under FOIA or the Privacy Act. Similar to the situation of foreign intelligence sources, the actual risk of disclosing identities of law enforcement sources may be very small, but the perception or fear of possible disclosure may result in silence. The result is less effective investigation, meaning more crime. . . . There is a real need for careful legislative attention and appropriate action on FOIA's effects upon law enforcement.

Business Confidentiality

Both the private interests of the business firms which submit information and the public's interest in their cooperation with government programs call for adequate protection for sensitive business information found in the government's records. . . .

On the question of what business information should be protectable, one approach might be a general standard of avoiding economic injury, with various factors to consider in applying it, supplemented by special standards or special procedures for particular industries, federal programs, or types of information needing special protection. . . . My view is that agency discretion to release information from a business that will jeopardize the business should not exist, unless release will advance a definite public interest, such as health, safety, or the integrity and efficiency of government, when and if such public interest outweighs the risk to the company. Even then, the submitter should have an opportunity to challenge the proposed release in court. . . .

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Personal Privacy

During the past year, the Court of Appeals for the District of Columbia Circuit, which is the most influential circuit in interpreting FOIA, has rendered a series of surprising decisions cutting back on personal privacy under FOIA Exemption 6. These decisions seriously reduce the ability of federal agencies to protect personal information about individuals when release of the information may adversely affect the individuals and where there may be no public interest to be served by such release.

These recent decisions run counter to the previous understanding of the law by most courts and lawyers, and counter to the intent of Congress in FOIA and the Privacy Act. They are based on a new interpretation of the phrase "similar files" in FOIA Exemption 6. The new interpretation is that "similar files" does not include personal information about specific individuals, the release of which might harm them, unless the information is "intimate" or "highly personal" in character. If the information is just "personal," that is not enough to qualify it for consideration for possible protection, even if its release could result in adverse effects, including death. This new interpretation of "similar files" will increase access to most federally-held information about identifiable individuals unless the information is in a "medical file," a "personnel file," or is protected by some special law like that affecting the census....

Congress explicitly wrote into the Privacy Act's definition of records the concept that the Act's protection should apply to "... *any item ... of information about an individual* ... maintained by an agency, including, *but not limited to*, his education, financial ... medical ... criminal or employment history that contains his name ... or other identifying particular ..." (emphasis supplied). Since the practical effect of that language depends in large part on FOIA, with which the Privacy Act interrelates, the recent judicial changes in the meaning of FOIA Exemption 6 also curtail the objectives sought by Congress in the Privacy Act....

I earnestly hope that other judicial circuits and Congress will quickly reject the D. C. Circuit's recent assault on FOIA's privacy exemption. This is especially important because personal privacy, although an interest of great importance with constitutional aspects, does not have effective support by strong organizations as do other major protectable interests....

The "Reasonably Segregable" Clause

In 1974, Congress inserted at the end of FOIA subsection (b) a clause requiring that an entire record not be withheld just because a portion of it is exempt. The principle is sound, but the provision as now worded has often generated problems in practice, causing additional work and uncertainty for agency personnel. A further result is that requesters sometimes receive useless gibberish, or more rarely but more seriously, receive sensitive information, perhaps about an informant, which slipped through without deletion.

The problem is in applying the statutory word "reasonably," and the cure is to spell out more definite standards to indicate when the segregation and release of non-exempt parts of a record is reasonable and when it is not. A study completed in my office in August 1979 contained such standards, and I believe they would represent a worthwhile improvement in the statute.

Conclusion

There are other significant problems which I have not mentioned, such as the protection of how-to-catch-crooks manuals under FOIA Exemption 2, and the widespread use of FOIA for pre-trial discovery. I also believe it would be desirable to consider what Congress might could do to encourage better administration of FOIA, but that is more than I can cover in today's statement.

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Excerpts from the statement of ***Steven R. Dornfeld,*** *Washington correspondent, Knight-Ridder Newspapers, on behalf of the* ***Society of Professional Journalists, Sigma Delta Chi,*** *before the Senate Judiciary Subcommittee on the Constitution, July 15.*

I am here today on behalf of the Society (of Professional Journalists) which, as you may know, is the oldest, largest and most representative organization of journalists in the United States. Founded in 1909, the Society has more than 28,000 members in all branches of the news media – print and broadcast....

The Society has been an active proponent of the FOIA since its inception.... In recent years, the Society has funded the lion's share of the Freedom of Information Service Center here in Washington, which has assisted hundreds of journalists in using the Act....

Our experience at the FOI Service Center has confirmed the Society's expectation that the FOIA would prove a valuable tool for professional journalists in their efforts to gather and report newsworthy information to the public. In 1980, the Service Center answered some 300 telephone requests for assistance from journalists seeking access to government information. In the first half of 1981, the Center has already handled another 300 requests.

The burgeoning activity at the Service Center is just one indication that the Act is a widely employed tool of journalists. Through formal requests or merely threatened requests under the Act, the public and the public's surrogate, to use Chief Justice Burger's term, the press, has been able to gain access to a wide range of information that has resulted in countless news reports of public interest. Without the FOIA, the public might never have received the news that:

—Ten elderly patients at a private Philadelphia nursing home died in 1964 and 1965 while they were being used as subjects in a drug experiment.

—Approximately one-third of all small corporations regularly underpaid federal income taxes in the late 1960's.

—Tests of drinking water near uranium mines in western New Mexico uncovered high levels of radioactivity and poisonous waste.

—Organizations that received federal grants to help fight alcoholism misused the taxpayers' money to influence legislation.

—Colleges and universities engaged in a widespread practice of sloppy bookkeeping and possible misuse of hundreds of millions of dollars of federal funds.

—A drug treatment center in Hawaii converted food stamps to make illegal cash payments to employees.

No laundry list of news stories can do much more than symbolize the enormous public benefits that have been realized because of press access to information under the FOIA. Indeed, the press has found that the mere existence of the FOIA has led government agencies to disclose information freely and candidly without the need for formal requests. . . .

Proposed Amendments

In presenting the Society's specific views concerning the proposed legislation currently before this subcommittee, we express two hopes at the outset: first, that you will again solicit the views of the Society and other press groups once the Justice Department has presented its comprehensive study of the FOIA; and, secondly, that you will exercise restraint in considering any amendment or fine-tuning of the Act, performing any needed adjustments with screwdrivers, not crowbars. Any perceived problems should be corrected at their precise source, leaving intact the tools needed to fulfill the Act's primary purpose of providing ready access to governmental information for the public and the public's surrogate, the press. . . .

Exemption for the CIA

S.1235 would realistically exempt the Central Intelligence Agency from the FOIA. The bill would eliminate judicial review and thereby prohibit courts from ordering the CIA to release anything it chooses to keep secret. The bill is also cast so broadly that a document containing even a word of exempt material could be withheld entirely.

The Society believes that S.1235 addresses a problem that does not exist. The FOIA does simply not threaten national security—it enhances it by building a well-informed electorate. The FOIA does not endanger the CIA's intelligence gathering operations. Apparently, it is an annoyance for the CIA at times, but public servants often find public accountability annoying. . . .

Experience demonstrates that the FOIA has been employed by responsible journalists to gain access to much useful information about this crucial agency. As a result of these disclosures, the American people have had an opportunity to develop a deeper appreciation of the effective bounds within which the agency must function. To deny the press and public access to virtually all information about the CIA simply because of agency complaints about administrative burdens is to remove the most effective means of public accountability available to the American people. . . .

Exemption for the FBI

In a similar manner, S.587 reponds to the Federal Bureau of Investigation's claims that its operations are somehow damaged by the FOIA. Specifically, S.587 would create a ten-year moratorium on the release of any information by the FBI. The agency would be permitted to refuse to release information not simply for ten years after it is gathered, but for ten years after a case is closed or a convicted participant is released from prison. Under S.587, the FBI could withhold information that arguably invades personal privacy for as long as 25 years after the person to be protected has died. Finally, S.587 gives the agency broad authority to withhold information about "conspiratorial activity," which presumably includes any concerted action by two or more persons.

The Society believes that the practical effect of S.587 would be to provide the FBI with a blanket exemption from the FOIA. From the perspective of journalists, the various moratoria contained in S.587 would extend far beyond the newsworthiness of the requested information. They would prevent any disclosure until long after such disclosure would serve any useful function in ensuring the public accountability of the agency. The public has an immediate and laudable interest in overseeing the operations of the FBI, so long as that oversight does not disrupt legitimate law enforcement activities.

To that end, the FOIA, through Exemption (b)(7), currently permits the FBI to withhold a great deal of information. . . . Precisely because these safeguards are already built into the FOIA, *the FBI is unable to*

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cite a single instance in which an investigation has been hampered due to an FOIA disclosure. . . .

Business Information

S.1247, introduced by Senator Dole, responds to claims by the business community that it, too, has been "damaged" by the FOIA.

S.1247 would create a "reverse" freedom of information procedure that would permit businesses to secure injunctive relief against the disclosure of information under the Act. It would require agencies to notify any person who submits information as well as any person about whom information is submitted that an FOIA request has been made and of their rights under the reverse-FOI system. The agency must wait ten days for the individual to respond before disclosing the requested information, and must provide the individual with a hearing, if one is requested. Only the notified individual would be entitled to attend this hearing—apparently, the requester has no standing to appear and argue the propriety of release. After the hearing, the agency must wait an additional 30 days before it issues a ruling. If the agency opts for release, the losing party may seek an injunction and *de novo* review in federal district court.

Once again, the Society believes that S.1247 responds to an illusory problem, anticipated by the draftsmen of the FOIA and dealt with successfully in Exemption (b)(4). . . . It is not surprising that the business community has been unable to document any concrete instances of damage it has suffered at the hands of the FOIA. Nor is it surprising, as the Securities and Exchange Commission can tell this subcommittee, that American business does not relish public disclosure even when their activities touch upon public funding or public regulation. . . .

Conclusion

In the near future, we urge this subcommittee to consider legislation that would, *inter alia*, (1) minimize delay by providing for prompt access to information requested in the public interest; (2) reduce the often preclusive costs of securing such information by cabining agency discretion to refuse to waive fees when the public interest is served by disclosure; and (3) enact into law a clear presumption in favor of disclosure absent demonstrable harm. In addition, we would ask Congress to check the proliferation of so-called (b)(3) exemptions by requiring that this subcommittee be given a mandate to review proposed (b)(3) exemptions prior to enactment.

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Excerpts from the statement of ***Jonathan C. Rose,*** *Assistant Attorney General, Office of Legal Policy,* ***Department of Justice,*** *before the Senate Judiciary Subcommittee on the Constitution, July 15.*

The administration and the Department of Justice believe that there are significant problems with implementation of some of the provisions of the current FOIA which urgently require legislative solutions. We strongly support the basic purpose and philosophy of the Act: To inform the public as fully as possible of the conduct of its government in order to protect the integrity and effectiveness of the government itself. Unfortunately, the Act has, in practice, often proven ineffective as a means of providing the public with information in a timely fashion. Only a small fraction of FOIA requests are from the press or other researchers who actually communicate information to the public (only about 7 percent of the 30,000 annual requests received by the Department of Justice are from such requesters). The Act has, however, been widely used by various private interests in ways which tend to harm rather than promote the public's interests in good and open government. . . .

Pursuant to a request by Attorney General Smith, the Department of Justice recently solicited comments from all government agencies on the operation of FOIA and requested suggestions on how the Act could be improved. . . . The Department is seeking to develop approaches which will ameliorate the problems which have been identified, while, at the same time, preserving FOIA as an effective tool for keeping the electorate as informed as possible without unduly interfering with effective government. . . . The Department intends to present to Congress a comprehensive package of administration amendments to the Act within the next two months. We would at this time, however, like to share with this committee our perception of the most important problems presented by the current provisions of FOIA, which should be addressed by legislation. . . .

The Reagan Administration is not seeking perfection in the operations of the FOIA. However, it does believe that the success of the Act to date must be tested against two standards: (1) the standard of an open government; and (2) the standard of an effective government. In our view the imposition of these two standards of judgment does not always lead to the same conclusions.

The Department of Justice believes that there are several pressing problems arising from the current structure and implementation of the Act.

First, the current application of the Act to criminal law enforcement agencies has significantly impaired the investigatory abilities of those agencies. It has also imposed very substantial administrative burdens and

does not appear, on balance, to be serving the public's interests in its current impact on those agencies.

Second, the current application of the Act to national security intelligence agencies, such as the Central Intelligence Agency and the National Security Agency, appears to have substantially impaired the ability of those agencies to gather confidential information. Compliance with the Act appears, in addition, to have diverted valuable intelligence-gathering resources, while providing little countervailing benefit to the public.

Third, the use of the Act by commercial interests to obtain information submitted by other businesses to the government appears to have impaired the government's ability to collect needed information from businesses and may result in the unfair disclosure of confidential business information submitted to the government.

Fourth, the misuse of FOIA as a discovery device by private litigants results in the circumvention of judicial and administrative rules which should control such discovery. In addition, such misuse of FOIA creates substantial and unjustified administrative burdens on the government, and can result in the delay and disruption of an agency's primary functions.

Fifth, the government's present inability under the Act to collect the full costs of FOIA requests, even from requesters using FOIA for private commercial or financial purposes, results in excessive and sometimes frivolous use of FOIA for private purposes at substantial cost to the taxpayer.

While this is by no means a comprehensive list of the problems inherent in the administration of FOIA which deserve legislative consideration, these appear from our own study to be the areas of greatest government-wide concern.

Effect on Law Enforcement Agencies

The Department of Justice has extensive experience with the problems caused by the application of FOIA to criminal law enforcement agencies. In 1980, the Department received about 30,000 FOIA requests. The majority of these were directed specifically to the Department's criminal investigatory agencies, the Federal Bureau of Investigation (which received over 15,000 requests) and the Drug Enforcement Administration (which received about 2,000 requests). Significantly, a large number of these requests were from convicted felons or from individuals whom the FBI and DEA believe to be connected with criminal activities. Such requesters have made extensive use of FOIA to obtain investigatory records about themselves or to seek information concerning on-going investigations, government informants, or government law enforcement techniques. . . .

The present requirements result in a very complicated and time-consuming review of law enforcement records. Moreover, it is often very difficult for an analyst to determine whether the release of even segregable information may have an adverse effect on important law enforcement interests. The release of what appears on the surface to be innocuous information may prove damaging when viewed within a broader context of information known by criminal requesters. Such requesters may be able to piece together segregated bits of information in ways unknown to the FBI employee responding to the request and use the information to identify the existence of a government investigation or an informant. It has been our experience that some criminals, especially those involved in organized crime, have both the incentive and the resources to use FOIA to obtain bits of information which can be pieced together. Some have shown great persistence in using the Act. The FBI, for instance, received 137 requests from one imprisoned felon who is reported to be an organized crime "hit man." This relentless user of the Act, and there are many others (some of whom have made more requests), is presently pressing a 35 count suit against the FBI under FOIA. . . .

Whether or not damaging information has been inadvertently released through FOIA, or informants have been uncovered through FOIA requests, it is very clear from the experiences of the FBI and DEA that gathering law enforcement information has become more difficult as a result of the Act. The perception is widespread that federal investigators cannot fully guarantee the confidentiality of information because of FOIA. This perception exists not only among individual "street" informants, who have become increasingly aware of the existence of FOIA, but also among institutional information sources, including local law enforcement agencies. . . . The FBI and the DEA have reported a large number of incidents in which potential informants have cited FOIA as their reason for declining to cooperate with the government. . . . The DEA has estimated that 40 percent of its requests are from prisoners and another 20 percent are from individuals who are not in prison but are known to the DEA to be connected with criminal drug activities. Eleven percent of the FBI's total requests are from prisoners (over 1,600 last year). . . . By contrast, only about five percent of all the requests to the FBI and DEA are from the media, scholars, or public interest research groups.

Impact on National Security Agencies

FOIA also presents very serious problems to those government agencies concerned with national security intelligence-gathering functions. . . . Our intelligence agencies can demonstrate that there is a belief among

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some important foreign sources that FOIA makes it impossible for our government to adequately protect sensitive information from disclosure. That belief significantly impedes our intelligence activities abroad. . . .

There is, of course, nothing in the Act to prevent its use by those whose interests are directly contrary to the national security. Mr. Phillip Agee, for example, has made extensive use of FOIA in his personal crusade to undermine the CIA abroad. The response to one request from Mr. Agee for all CIA records containing mention of him cost the American taxpayer over $300,000. This is a government expense which many citizens and members of Congress might justifiably question, particularly in a time of severe budgetary constraints. However, under existing law, CIA had no choice but to expend the money.

We recognize that, in the view of some, FOIA may appear to provide some protection against any improper use of intelligence agencies. We believe, however, that congressional oversight of the intelligence agencies, established in its present form after the 1974 amendments to the Act, is more than adequate to protect against any possibility of future intelligence agency misconduct. Such oversight has proven a far more effective protection of the public's interests in this area than FOIA could conceivably be, and it has not resulted in comparable administrative burdens, questionable expenditures of resources, or the creation of a serious perception problem among sources of needed intelligence.

Use as Litigation Discovery Device

There are, of course, no limits under existing law on who may utilize FOIA or on the circumstances or purposes for which it may be used. As a result, it is common practice for parties in litigation with the United States to request information under the Act, even where they have compulsory process available under the rules of civil or criminal procedure or under agency regulations. It is likewise common for parties involved in private litigation to use FOIA rather than available discovery procedures to obtain government information concerning their case. Such requests are often nothing more than attempts to circumvent applicable discovery rules or, in some cases, to harass the government.

Discovery rules attempt to draw a careful and fair balance between the needs of the requester and the burdens imposed on the discovery target. They generally require a showing that the requested matter is relevant and material to the proceeding, that there is a need on the part of the requester, and that the burden on the respondent is not excessive. A requester under FOIA is not required to make any such showing. Thus a requester/litigant can, through FOIA, freely pursue, at taxpayer expense, "fishing expeditions" and impose excessively burdensome document production requirements which are, for good reason, impermissible under the applicable discovery rules.

Discovery rules also contain response time schedules which are far more tolerant than those in FOIA and which can be adjusted by a court to respond to the needs of a particular situation. By contrast, FOIA's short, mandatory and inflexible time limits force agencies to give FOIA requests the highest priority. Responding to requests can often interfere substantially with an agency's ability to pursue an enforcement action. It is often necessary for the government attorneys responsible for a government litigation to themselves take time from their case preparation to review documents in response to a FOIA request from an opposing litigant. There is considerable evidence that many in the private bar are aware of the potential for disruption and delay of litigation afforded by FOIA and deliberately use the Act to harass a prosecuting agency. . . .

The Antitrust Division, for example, estimates that more than half of the FOIA requests it receives are made by actual or potential litigants in antitrust suits. These are often extremely burdensome requests, seeking Division information covering whole industries.

We do not believe that Congress intended FOIA to be so used as a means of disrupting law enforcement or avoiding the rules of discovery in judicial or administrative proceedings, and we believe congressional action to prevent such misuse of the Act should be seriously considered.

Disclosure of Business Information

Effective government requires a constant flow of reliable business information from private enterprises. This flow will clearly be impeded if the government cannot maintain the confidentiality of valuable proprietary and competitively sensitive information submitted to it. It is clear that Congress intended to fully protect the legitimate interests of business submitters through the (b)(4) exemption, which permits agencies to withhold "trade secrets and commercial or financial information" which is obtained from an outside party and is "privileged and confidential." However, this exemption has been given a narrowing construction by the courts, which have required a showing that the release would either (1) result in a substantial risk of competitive injury to the submitter, or (2) impair the agency's ability to collect similar information in the future. Unfortunately, this test has not proven as adequate as it might first appear. This is principally so because agencies frequently lack an adequate awareness of all factors in a particular business setting necessary to predict accurately the competitive harm caused by disclosure. . . .

It is apparent that commercial interests have made great use of FOIA in many agencies to obtain information submitted by competitors. For instance, over 85 percent of the FOIA requests to the Food and Drug Administration, which received over 33,000 FOIA requests last year, are from the regulated industry, their attorneys, or FOIA request firms who are believed to be operating on behalf of the regulated industry. The requests most often are for information submitted to the FDA by competitors. . . .

There is at least a perception in parts of the business community that commercially valuable information submitted to the government is vulnerable to FOIA requests. As a result, there is evidence that businessmen are more reluctant to make such information available to the government, and the quality of information received from the business community has deteriorated. This is clearly an unforeseen and undesirable result of the Act's operation.

This increasing reluctance of the business community to trust the government with confidential information is very evident from the experience of the Antitrust Division of the Justice Department. . . . Because of the fears within the business community regarding the potential disclosure of submitted information, investigation targets and third parties have become increasingly more reluctant to comply with voluntary production requests. This has forced the Division to rely more heavily upon the use of compulsory process which is not only more time consuming and expensive, but also results in less forthright cooperation from the submitting party. In fiscal year 1976, the Division issued only 66 Civil Investigative Demands (CID's). In fiscal 1978 this figure rose to 359, and in fiscal 1980 to 910. Knowledgeable persons within the Division attribute this rise in the need to invoke CID's to the uncertain protection afforded submitters of confidential business information under FOIA and the complete exemption from FOIA allowed for information submitted pursuant to a CID. . . .

The current terms of the FOIA do not provide the business submitter with an adequate procedural means to assert and protect his interests either before the agency or in court. There is currently no statutory requirement that agencies give notice to submitters of information before releasing information they have provided. Nor does FOIA give submitters the right to prevent the discretionary release of business information which is exempted from mandatory disclosure under (b)(4). The Supreme Court's decision in *Chrysler* v. *Brown*, 441 U.S. 281 (1979), allows submitters only a right to challenge a discretionary release as an abuse of discretion if the release is prohibited by the Trade Secrets Act, 18 U.S.C. § 1905. . . .

Financial Cost, Fee Collections

At present, it appears that agencies collect, through fees charged to the requester, only about 4 percent of the direct cost of responding to FOIA requests. . . .

There is no reason why those who are using the Act to serve private commercial and financial interests should not be required to pay the full costs of FOIA processing and, when appropriate, the fair market price for commercially valuable information. The failure to do so not only results in the unnecessary expenditure of considerable taxpayer money to serve the narrow interests of private requesters, but also tends to encourage frivolous or unnecessarily broad requests. So long as FOIA requests are virtually free, we can expect sophisticated commercial users to make extensive and unnecessary use of the system.

The scope of the publication and indexing requirements imposed by subsection (a)(2) of the Act must also be reexamined in light of the substantial costs of compliance incurred by some agencies and, in some cases, the minimal resulting public benefits. Subsection (a)(2) of the Act requires agencies to index and make available to the public all final decisions and orders of an agency. Some agencies issue tens of thousands of such decisions yearly which are of virtually no interest to the public. They must, nevertheless, be indexed and made available to the public under FOIA. The National Labor Relations Board, for instance, spent over $110,000 for the preparation of indexes of final decisions last year. The NLRB reports that there has been only one request in eight years for a document located through one of its indexes which contains entries for over 50,000 representation decisions by the Board's regional directors. Ninety percent of another NLRB file containing more than 125,000 documents, which is indexed and made available under FOIA, is comprised of regional director complaint dismissal letters. In eight years there has not been a single public request for a copy of any of these letters. We doubt Congress intended to impose such meaningless bureaucratic chores, but such results are required by the present terms of FOIA. . . .

Congressional Exemption

I would note also that Congress may wish to reconsider its own complete exclusion from the Act. Nothing in our review of the Act to date has convinced us of the wisdom or necessity for this complete and total congressional exclusion. Certainly no body of the federal government has more to do with how key decisions affecting our citizens are made. Why then, should the files of Congress be totally exempt? Since the judiciary operates on a public record, there is no comparable need to subject the judiciary to the Act.

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However, we would urge that the Congress reexamine the rationale which underlies its own exemption. . . .

We believe that, with the benefit of the experience which we have now acquired in administering this statute, abuses can be prevented while the Act is, at the same time, made a more effective and useful vehicle for public communication. We look forward to working with this committee in this common effort.

* * * *

Excerpts from the statement of ***William H. Taft IV,*** *General Counsel,* ***Department of Defense,*** *before the Senate Judiciary Subcommittee on the Constitution, July 15.*

The Department of Defense (DOD) is strongly committed to the effective implementation of the Freedom of Information Act. Our record demonstrates our commitment to honor those requests for information by members of the public, consistent with the national security and the protection of government interests defined in the exemptions of the Act. . . .

While, of course, we do not expect that the many substantial benefits of the Act can be realized without incurring some costs, we believe that the Act in certain aspects unnecessarily detracts from the efficiency of the Department's decision making and poses avoidable risks to the national security. . . .

In calendar year 1980, 57,053 public requests were received under the FOIA by the DOD. . . . Only 2,829 of those 57,053 requests submitted under FOIA were denied, either in whole or in part, in calendar year 1980 based upon the FOIA statutory exemptions. . . .

Those Who Benefit

Given the costs imposed by the FOIA and the minimal recoupment available, it is important to examine who is receiving the benefits of the Act. As the Act authorizes "any person" to seek access to agency records, any United States or foreign citizen, corporation, etc., is entitled to use FOIA. Since 1975, only 20 percent of all FOIA requests received by the office of the Secretary of Defense were received from private individuals. Fourteen percent of the requests were received from special interest lobbying groups. By contrast, 55 percent of the FOIA requests received by DOD since 1975 have come from business firms, especially law firms. . . .

First, as indicated above, law firms representing commercial enterprises use FOIA rather than discovery or to supplement discovery in connection with litigation either to decrease fees incurred in the litigation process or obtain records not available through that process. For example, the DOD received one request from a large D. C. law firm for essentially all documents which had been generated in connection with the Trident submarine. It was estimated that compliance with this request would have required searching 12,000 linear feet of files (approximately 24 million pages) just to locate the requested documents. The effort to locate and review specific requested documents for releasability was estimated to involve a minimum of 350,000 manhours. Obviously, compliance with a request of this nature would have a serious adverse impact upon performance of the primary agency mission.

A second problem with the use of the Act is that the Department of Defense is required to expend substantial public resources in responding to requests for voluminous records from persons who are not citizens of the United States at all. There have been cases in which foreign nationals have requested and received sensitive information that, although not classified, relates to national security matters. Foreign businesses have also used the Act to obtain commercial information, such as industrial designs submitted by American firms during the contract award process. In still other cases, citizens of foreign governments have used the Act to gain access to Department of Defense documents for the purpose of opposing the plans of their own governments for cooperative security arrangements with the United States. . . .

The Effects of FOIA

Perhaps no more onerous provision of the Act exists for the DOD than the (b)(5) exemption covering those records which are "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." The necessity of determining whether the inter-agency memorandum or letter would be available to another party, has been interpreted by the courts to require the agency to review, on a line-by-line basis, staff papers and other advisory records. This line-by-line analysis is necessary in order to make available to the requester factual material that is severable from privileged advisory portions of the record and not otherwise exempt from disclosure. . . .

The legislative history of the Act has been interpreted to exclude records of the president and his close advisors. That interpretation has not been extended to those personal advisors who are high-ranking cabinet officials, or others acting on their behalf, when such officials are advising the president. This creates another burden on effective decision making. Advice rendered to the president by a cabinet official is as important, and, therefore, as deserving of protection under the Act, as advice a president receives from his personal advisors. . . .

Available evidence also indicates that the Act is having a detrimental effect on our security relationships with other countries. Some foreign governments and confidential sources of information are beginning to limit or end cooperation with the United States in sensitive matters of national security in response to recent interpretations of the Act. Federal district court judges are obliged to fulfill the requirement for *de novo* review of records denied because of a security classification by reviewing the basis for the agency's classification determination. Even though the courts give "substantial weight" to agency affidavits certifying the validity of the agency's classification, in some cases the courts have insisted on supplementary classified affidavits submitted *in camera* for *ex parte* consideration by the judge, and in a few cases, *in camera* review of the classified records in question before determining the applicability of the alleged exemption. Concern over protecting the classified affidavit and the unpredictable exposure of sensitive records to the court have alarmed some foreign governments and some confidential sources of information. This concern has led to the consideration of legislative proposals that would exclude government organizations involved in intelligence gathering from the definition of the term "agency" under the Act. . . .

Another problem caused by the FOIA is that the Department of Defense must make available to "any person" records which the Arms Export Control Act and the Export Administration Act otherwise protect against export. The Arms Export Control Act, 22 U.S.C. § 2778, requires that a license be obtained from the State Department before data containing "critical technology" may be exported from the United States. The Export Administration Act, 50 U.S.C. App. § 2402, imposes a similar requirement for authorization from the Commerce Department for exportation of other kinds of technical commercial data. It is not certain, however, that either of these statutes constitutes a basis for withholding records containing this same data from a requester under the Act. . . .

To assure the continued effectiveness of the Act to achieve those purposes intended by the Congress, we believe that these matters need to be addressed by legislative changes. The administration is developing specific proposals for consideration by the Congress on these points. We look forward to working with your committee as it reviews them.

* * * *

Excerpts from the statement of ***Adm. B. R. Inman,*** *Deputy Director of* ***Central Intelligence,*** *before the Senate Select Committee on Intelligence, July 21.*

I am convinced that there is an inherent contradiction in the application of a statute designed to assure openness in government to agencies whose work is necessarily secret, and that the adverse consequences of this application have caused intelligence functions to be seriously impaired without significant counterbalancing of public benefit. I believe that it is time to reexamine the fundamental question of whether it makes sense for the FOIA to be applicable to our nation's two most sensitive intelligence agencies. . . .

Prior to the 1974 amendments (to the Freedom of Information Act), the Central Intelligence Agency had received virtually no FOIA requests, and no litigation had been initiated against the Agency in connection with any denial of release of information under the classified documents exemption. The 1974 amendments made several fundamental changes in the Act, the most notable of which were:

1. Reasonably segregable portions of a document not falling under the Act's exemptions were required to be provided to the requester; and
2. The courts were given authority to review agency determinations that records were withholdable under the Act. This has resulted in an increasing tendency on the part of the courts to second-guess the judgment of professional intelligence officers that information is properly classified in order, for example, to protect the identity of intelligence sources.

These amendments led to an explosion in FOIA requests directed at the CIA, and a corresponding increase in associated litigation. . . . The CIA's latest annual report on its administration of the Act contains the following statistics for calendar year 1980:

- 1,212 new FOIA cases were logged during 1980.
- 257,420.5 actual man-hours of labor (or 144 man-years) were devoted to the processing of Freedom of Information Act, Privacy Act, and mandatory classification review requests, appeals, and litigation, as compared with the 110 man-years of labor devoted in 1979. More than half of these resources were devoted to the processing of requests for subject matters information under the FOIA.
- Over $3 million was expended in personnel costs for processing, appeals, and litigation related to these requests. About two-thirds of this amount was spent on FOIA cases.

The money and manpower currently being devoted to FOIA matters could certainly be utilized more productively in substantive intelligence pursuits. . . .

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The Hidden Costs

The need to protect intelligence sources and methods through a complex system of compartmented and decentralized records is in direct conflict with the concept of openness under the FOIA. Because a primary CIA mission is to gather information, its records systems are constructed to support that mission, and thus, the search for records in response to an FOIA request becomes uniquely difficult. These records, which number hundreds of millions of pages, are compartmented and segregated along operational and functional lines. Several components have multiple records systems. Thus, the search for information responsive to an FOIA request is a demanding and time-consuming task. A relatively simple FOIA request may require as many as 21 Agency record systems to be searched, a difficult request over 100. The "need to know" principle, also, means that CIA employees normally have access only to information necessary to perform their assignments. Thus, in the process of searching for documents in response to an FOIA request, people who would otherwise never have access to compartmented information necessarily see such documents. . . .

In most other government agencies the review of information for possible release under the FOIA is a routine administrative function; in the Central Intelligence Agency it can be a matter of life or death for human sources who could be jeopardized by the release of information in which their identities might be exposed. In some circumstances mere acknowledgment of the fact that CIA has *any* information on a particular subject could be enough to place the source of that information in danger.

It must be remembered that the primary function of the CIA is intelligence gathering, an activity which frequently takes place in a hostile environment, and which must take place in secrecy. The mere disclosure that the CIA has engaged in a particular type of activity or acquired a particular type of information can compromise ongoing intelligence operations, cause the targets of CIA's collection efforts to adopt countermeasures, or impair relations with foreign governments. Agency records must be scrutinized with great care because bits of information which might appear innocuous on their face could possibly reveal sensitive information if subjected to sophisticated analysis or combined with other information available to FOIA requesters.

This review is not a task which can be entrusted to individuals hired specifically for this purpose, as is the case with many other government agencies whose information has no such sensitivity. The need for careful professional judgment in the review of CIA information surfaced in response to FOIA requests means that this review requires the time and attention of intelligence officers whose primary responsibilities involve participation in, or management of, vital programs of intelligence collection and analysis for the president and our foreign policymaking establishment. Experienced operations officers and analysts are not commodities which can be purchased on the open market. It takes years to develop first-class intelligence officers. . . .

Litigation

Efforts to fulfill our intelligence missions while subject to the provisions of the FOIA have placed the CIA in a vicious cycle. Intelligence information must be processed and analyzed quickly if the president, the cabinet, and the Congress are to receive the latest and most accurate assessments of foreign developments. The need for up-to-the-minute information frequently prevents the review of FOIA documents from taking place in keeping with the time requirements of the Act. This results in the Agency being sued for failure to comply with the Act, which, in turn, requires an even greater amount of time and effort to be expended in the litigation process. The defense of such suits, as well as those that are brought because of a denial of the information requested, requires the time and effort of numerous personnel, including intelligence officers directly concerned with the request in question. Thus, these intelligence officers are again diverted from their primary intelligence duties and put even further behind in reviewing other FOIA documents. . . .

The CIA has been sued for denying information in response to FOIA requests in 198 lawsuits. The conduct of this litigation involves not only an enormous amount of lawyer time at the Agency and the Department of Justice but since the factual submissions must be presented by substantive intelligence officers by way of affidavits and depositions and the like, the litigation process places an enormous burden on people who should be doing other things. Yet all this activity in court has, with almost no exception, resulted in a judicial affirmance of CIA and NSA claims of national security exemptions. However, the fact remains that judges with no expertise in the arcane business of intelligence may believe that under the provisions of the Act they can overrule an intelligence agency's decision as to the classification of particular documents and order their release. . . . In one case involving CIA records a district court judge has specifically overruled a CIA classification determination and the court of appeals has upheld this ruling. A petition for a rehearing on this case is now pending. . . .

I cannot help but wonder how much better our intelligence product might have been in some key areas

had the time and effort devoted to FOIA litigation by senior intelligence officers been focused instead on crucial intelligence missions.

The Matter of Exemption

I would like to add one other point which is related to the FOIA process. The Freedom of Information Act currently contains exemptions for classified documents and other matters that are set forth as exempt from disclosure. These exemptions have generally been adequate to protect sensitive national security information. But, even with the kind of quality resources we devote to the review process, human error is always a possibility. Such errors have in fact occurred, resulting in the inadvertent disclosure of sensitive CIA and NSA information. These unintentional disclosures are constant reminders of the risk which will be present so long as these agencies are subject to the Act. The handling of FOIA requests involving CIA and NSA information by other agencies has also resulted in some serious compromises of classified information relating to intelligence sources and methods. Compounding these problems are attempts by requesters to gain additional classified information based upon these compromises.

The FOIA further impedes the CIA's ability to do its job through the perception it has created overseas. . . . It must be remembered that many individuals who cooperate with the intelligence efforts of the United States do so at great personal risk. Identification as a CIA agent can ruin a career, endanger a family, or even lead to imprisonment, torture, or death. We must be able to provide human sources with absolute assurance that the fact of their cooperation with the United States will forever be kept secret and that the information they provide will never be revealed or attributed to them. The FOIA has raised doubts about our ability to maintain such commitments, despite our explanations that the Act provides exemptions which allow for the safekeeping of sensitive information. . . . There have been many cases in which individuals have refused to cooperate with us, diminished their level of cooperation with us, or totally discontinued their relationship with our people in the field because of fears that their identities might be revealed through an FOIA release. What we will never know is how much valuable information has been lost to the United States due to the reluctance of potential human sources to even begin a relationship. . . .

Conclusion

Nothing which I have said should be construed to indicate any lessening in our belief that individual Americans should continue to be able to determine whether or not an intelligence agency holds information on them, and to obtain this information when security considerations permit. I wish to state categorically that CIA and NSA would continue full compliance with the Privacy Act even if these agencies were to be totally excluded from the FOIA.

Case Note—*Agee* v. *CIA* Court Denies FOIA Request

In the July issue of *Intelligence Report* a case note on the Supreme Court decision in *Haig* v. *Agee* set forth the court's refusal to approve any constitutional protection for Agee in the matter and manner of revocation of his passport.

In *Agee* v. *CIA*, decided on July 17 by Judge Gesell in the U. S. District Court for the District of Columbia, the court refused to make available to Agee (with five minor exceptions) certain documents in the possession of the CIA "pertaining to, referring to, or in any way related to himself."

The case was unique, because in the words of Judge Gesell it was—

> the first Freedom of Information Act case where an individual under well-founded suspicion of conduct detrimental to the security of the United States has invoked FOIA to ascertain the direction and effectiveness of his effort to subvert the country's foreign intelligence program.

In response to Agee's request under FOIA, the CIA located 8,699 CIA documents. The Agency refused to release 8,175 documents in their entirety, and released most of the remainder only in part, claiming exemption under FOIA [sections (b)(1), (b)(3), (b)(5) and (b)(6)].

What Agee wanted was the entire record of his employment, including "covers" arranged for his intelligence work with the Agency, as well as the missions assigned to him. But, more importantly, he wanted full documentation of an extensive, on-going counterintelligence effort which the CIA mounted against him following his resignation and subsequent breach of his employment contract.

Quite understandably, considering Agee's concerted attack on the Agency in book, song and travel, it sought, in the words of the court—

> to protect its sources of information, its counterintelligence methods and specific information relating to its day to day efforts to thwart Agee's persistent campaign against it.

Most (8,127) of the documents were classified by the Agency and were therefore claimed to be protected under FOIA section (b)(1). Judge Gesell took the unusual step of traveling out to the CIA headquarters and conducting "a random *in camera* review

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of the documents." He concluded as a result of such review that—

> there is no basis for questioning the classification reached in this case. . . . Much of the material was classified to protect vital and often fragile intelligence sources in most instances still available and used. Beyond this, many of the documents comprise an active counterintelligence file replete with information about Agency activities which, if revealed, would compromise a large number of personnel as well as the underlying apparatus vital to the nation's intelligence effort. It is not the function of this court to go beyond this and second guess the trained concerns of experienced intelligence officials.

The court rejected Agee's challenge that the CIA had not supplied a sufficiently detailed "index" of the requested documents, stating that—

> the court holds that no further "indexing" will be required. Any type of more specific index that would be meaningful to Agee or the court would breach the very exemptions claimed.

The court also rejected Agee's contention of alleged Agency misconduct, saying—

> As far as this case is concerned, the court is entirely satisfied from its random inspection of the materials themselves that no exemption is being claimed as a pretext to conceal misconduct.

After noting the tremendous cost in money (over $400,000) and time (25,000 man hours) spent on document retrieval (not to mention court costs and time spent), Judge Gesell opined—

> It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails. Nonetheless, the court, conscious of its responsibility to apply the Act, *as presently written and interpreted,* has diligently sought to assure itself that under the exacting standards laid down the CIA has complied in good faith with Agee's extraordinary request. (Emphasis added.)

Put in non-judicial language, the judge seems to be saying: As long as FOIA is on the books "as is," the CIA is stuck with it and so is the court—it ought to be changed to relieve both of us of this ridiculous, wasteful burden.

In any event (except for five congressional letters written to the CIA about Agee), the court granted the Agency's motion for a partial summary judgment and denied Agee's motion for a more particularized justification "for non-disclosure of CIA documents."

Chairman Receives Appointment

Chairman Morris I. Leibman of the Standing Committee on Law and National Security has been appointed by Secretary of State Haig as the Department of State's ex-officio member of the U. S. Holocaust Memorial Council.

Law Professor Workshop to be Held

The next Law Professor Workshop entitled "U. S. and Latin America: A Relationship in Need of a Policy," will be held in San Diego at California Western School of Law on December 11-12.

For further information contact: William C. Mott, Suite 709, 1730 Rhode Island Avenue N.W., Washington, D. C. 20036.